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December 22, 2016

Federal Election Commission  
Jeff S. Jordan, Assistant General Counsel  
Office of Complaint Examination  
and Legal Administration  
999 E. Street, NW  
Washington, DC 20463

Re: MUR 7166

Dear Mr. Jordan:

We write as counsel to Tom Nelson, Nelson for Wisconsin and Dr. Beth Gillis, in her official capacity as treasurer ("Respondents"), in response to the complaint filed by the Republican Party of Brown County on October 26, 2016 (the "Complaint"). The Complaint incorrectly claims that Respondents failed to provide sufficient disclaimers in the advertisement, that Respondents' advertisement triggered independent expenditure reporting requirements, and that the advertisement was coordinated with Hillary for America. However, the Complaint is wrong in concluding that the ad triggered special disclaimer or disclosure requirements, and offers no facts to support its groundless allegations of coordination. Because the Complaint fails to set forth sufficient facts, which, if true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"), or Federal Election Commission ("FEC" or "Commission") regulations, the Commission should find no reason to believe a violation occurred and promptly dismiss the Complaint.<sup>1</sup>

Tom Nelson ran as the Democratic candidate for the 8th congressional district of Wisconsin in the 2016 election; he lost the general election to Republican Mike Gallagher.<sup>2</sup> Nelson for Wisconsin served as his principal campaign committee.<sup>3</sup> On October 21, 2016, Nelson for Wisconsin produced a television advertisement highlighting the differences between Mr. Nelson and Mr. Gallagher.<sup>4</sup> In the advertisement, Mr. Nelson identified himself ("I'm Tom Nelson...") and stated that he approved the communication ("I approve this message because Donald Trump is dangerous and we can't let him become president"), all while appearing full-screen without

<sup>1</sup> Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas, Matter Under Review 4960 (Clinton for U.S. Exploratory Committee) (Dec. 21, 2000).

<sup>2</sup> Tom Nelson, Statement of Candidacy (filed Apr. 7, 2016).

<sup>3</sup> Nelson for Wisconsin, Statement of Organization (filed Apr. 7, 2016).

<sup>4</sup> Nelson for Wisconsin, *Real*, Youtube.com, available at <https://www.youtube.com/watch?v=kUy8Wr5rPw&feature=youtu.be>.

voiceover.<sup>5</sup> At the bottom of the screen, a written disclaimer read: "Paid for by Nelson for Wisconsin, Approved by Tom Nelson."<sup>6</sup>

The Complaint makes three allegations against Respondents regarding the advertisement:

*First*, it claims the advertisement "fail[ed] to include proper independent expenditure disclaimers."<sup>7</sup> Yet the advertisement was a television communication that was authorized by a candidate—Mr. Nelson—and it contained precisely the disclaimers required for that type of communication.<sup>8</sup> It concludes with Tom Nelson facing the camera and stating "I approve this message,"<sup>9</sup> with a written disclaimer at the bottom of the screen: "Paid for by Nelson for Wisconsin, Approved by Tom Nelson."<sup>10</sup> Commission regulations require that public communications authorized and paid for by a candidate or the candidate's campaign committee include a disclaimer identifying who paid for the message.<sup>11</sup> Respondents satisfied this requirement by including the written disclaimer at the end of the advertisement, and thus no disclaimer violation has occurred.

*Second*, it claims that the ad "triggered an independent expenditure in the federal race for United States President" and that Respondents failed to file a required 48-hour independent expenditure report with the Commission.<sup>12</sup> However, the advertisement at issue does not meet the Commission's definition of independent expenditure. Under Commission regulations, an independent expenditure is an expenditure for a communication "*expressly advocating* the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents."<sup>13</sup> The Commission has found that "express advocacy" "does not encompass all communications that make favorable or unfavorable references to federal candidates."<sup>14</sup> Rather, a communication will be considered "express advocacy" "only if it contains a clear call to a specific electoral action -- the election or defeat of a federal candidate -- and cannot reasonably be interpreted to have any other meaning."<sup>15</sup>

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<sup>5</sup> *Id.*; Compl. at 2.

<sup>6</sup> *Real*, *supra* note 4, at :25-:27.

<sup>7</sup> Compl. at 1.

<sup>8</sup> See 11 C.F.R. § 110.11(c)(3).

<sup>9</sup> *Real*, *supra* note 4, at :25-:27.

<sup>10</sup> *Id.*

<sup>11</sup> 11 C.F.R. § 110.11(b)(1)

<sup>12</sup> Statement of Reasons of Vice Chairman Matthew S. Peterson, Commissioners Caroline C. Hunter and Donald F. McGahn, Matter Under Review 6113 (Hollingsworth) (Dec. 18, 2009) at 1.

<sup>13</sup> 11 C.F.R. § 100.16(a) (emphasis added).

<sup>14</sup> Statement of Reasons, *supra* note 12 at 3.

<sup>15</sup> Statement of Reasons, *supra* note 12 at 4.

In the past, the Commission has declined to find reason to believe a violation occurred in circumstances just like these. In Matter Under Review 6113 (Hollingsworth), a candidate for the Texas House of Representatives authorized his campaign committee to issue a mailer, including the statement: "Barack Obama's liberal policies are bad for America...and Mark Homer's [Hollingsworth's opponent] blind support for these policies are bad for Texas."<sup>16</sup> The complaint alleged that because the advertisement "expressly advocated" the election of John McCain, the ad constituted an independent expenditure that "activated disclosure and disclaimer obligations."<sup>17</sup> Three Commissioners disagreed, explaining that nothing in the mailer "urge[d] the reader or listener to elect John McCain or defeat Barack Obama."<sup>18</sup>

The same conclusion logically applies here. Just like the ad in Matter Under Review 6113, this ad "discuss[ed] the character and positions of [the] federal candidate[] to help [Nelson's] own electoral prospects" and compared Nelson's positions against those of Donald Trump.<sup>19</sup> The ad refers to Mike Gallagher five times, and to Trump only twice, and even then only in the last five seconds. This is not an independent expenditure opposing Donald Trump. Rather, it is a communication supporting the election of *Nelson*, using Mike Gallagher's support of Trump as a reason to vote against *Gallagher*.

*Third*, the Complaint concludes based on "the content and timing of the advertisement at issue, it is...likely" that Respondents coordinated their efforts with the Hillary for America campaign.<sup>20</sup> This statement is a mistake of law. It conflates the "content" and "conduct" prongs of the coordination test, assuming that if the first is met, the second must be also.<sup>21</sup> Yet the Commission consistently analyzes these prongs separately.<sup>22</sup> And the Complaint fails to provide any evidence of coordination. It relies solely on the advertisement's proximity to the election and its reference to Mr. Trump to conclude the advertisement was coordinated. However, "[u]nwarranted legal conclusions [drawn] from asserted facts" or "mere speculation" cannot support a finding of reason to believe.<sup>23</sup> For example, in Matter Under Review 6059 (Sean Parnell for Congress), the Commission dismissed a complaint that *assumed* coordination had occurred, confirming that a mere inference of coordination was not enough.<sup>24</sup> This Complaint alleges not a single fact to

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.* at 1.

<sup>18</sup> Statement of Reasons, *supra* note 12 at 4. The Commission added that "[t]he regulatory definition of 'express advocacy' cannot be stretched to cover communications that reasonably can be read as something other than advocating the election or defeat of a federal candidate." *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Compl. at 1.

<sup>21</sup> See 11 C.F.R. § 109.21(c), (d). A public communication must satisfy a three-prong test to be considered a coordinated communication: it must (1) be paid for by a person other than a candidate, authorized committee or political party committee with which it is coordinated; (2) satisfy one or more content standards; and (3) satisfy one of several conduct standards. See *id.* § 109.21(a).

<sup>22</sup> See, e.g., Factual and Legal Analysis, Matter Under Review 7029 (McGinty) at 6-8.

<sup>23</sup> Matter Under Review 4960, *supra* note 1.

<sup>24</sup> Factual and Legal Analysis, Matter Under Review 6059 (Sean Parnell for Congress) at 5 (citing 11 C.F.R. § 109.21 (d)(1)-(6)).

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suggest that Respondents coordinated this ad with the Hillary for America campaign occurred—and indeed they did not.

### CONCLUSION

The Commission may find “reason to believe” only if a Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act.<sup>25</sup> Yet here, the Complaint on its face shows Respondents complied with the disclaimer requirement. It claims that the ad somehow triggered an independent expenditure in opposition to Donald Trump, when in fact it simply used Trump as a vehicle to encourage support for Mr. Nelson. And, while the Complaint alleges coordination between the Nelson and Clinton campaigns, it presents no fact whatsoever to support the allegation. We respectfully request the Commission to find no reason to believe Respondents committed any violation of the Act and dismiss this matter, so that Mr. Nelson may terminate his now-defunct campaign.

We appreciate the Commission’s consideration of this response.



Very truly yours,  
Brian G. Svoboda  
Courtney Weisman  
Counsel to Respondents

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<sup>25</sup> 11 C.F.R. § 109.21(a).